Office - Supreme Court,
FILED
MAR 2 1954
HAROLD B. WILLEY, C

2 No petition printed!

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

No. 388. Miscellaneous.

THOMAS JOSEPH JONES,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
a Corporation,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Missouri.

RICHARD WAYNE ELY,
ROBERT C. ELY,
611 Olive Street,
St. Louis 1, Missouri,
Counsel for Respondent.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Subject Index.

	Page
Statement	1
Argument	3
Conclusion	4

Table of Cases Cited.

Boylan v. U. S., 257 U. S. 614, 42 S. Ct. 113, 66 L. Ed. 397	3
Citizens' Bank of Michigan City, Ind., v. Opperman, 249 U. S. 448, 39 S. Ct. 330, 63 L. Ed. 701	3

Statutes Cited.

28 U. S. C. 1257 (3)	3
28 U. S. C. 2101 (c)	3

Supreme Court Rules Cited.

Rule 38 (1)	4
Rule 38 (3)	4

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

No. 388. Miscellaneous.

THOMAS JOSEPH JONES,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
a Corporation,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Missouri.

STATEMENT.

The petition for certiorari is not accompanied by a certified transcript of the record in this case; therefore, we are unable to support this statement by page references to the record as required by the rules of this Court.

Petitioner, as plaintiff, brought suit in the Circuit Court of the City of St. Louis, State of Missouri, against respondent (defendant), claiming a right to recover under the

Federal Employers' Liability Act. The verdict of the jury was in favor of respondent, and judgment was duly entered. Upon motion of petitioner the Circuit Court set aside the judgment, and a new trial was granted. Respondent appealed to the Supreme Court of Missouri, which Court reversed the Circuit Court and ordered respondent's judgment reinstated. Petitioner filed a motion for a rehearing or to transfer to the Court en Banc (the last relief that could be obtained by petitioner in the highest court of the State of Missouri), and that motion was overruled on September 14, 1953 (as is admitted on the first page of petitioner's typewritten petition for certiorari filed with this Court).

The Supreme Court of Missouri issued its mandate to the Circuit Court of the City of St. Louis, and a certified copy dated December 29, 1953, was forwarded to the Circuit Court and filed by the Circuit Court on October 23, 1953, on which date the Circuit Court entered judgment in favor of respondent in accordance with the mandate, and the judgment in favor of respondent was reinstated.

On February 5, 1954, respondent was served by petitioner with a Notice of Filing Petition for a Writ of Certiorari, which notice states that the Petition for a Writ of Certiorari was filed with this Court on January 28, 1954.

ARGUMENT.

I.

In his petition for a writ of certiorari petitioner points out that "jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3) and 2101 (c)." Section 1257 (3) provides that this Court may review the final judgment herein, "by writ of certiorari." Section 2101 (c) provides that such writ of certiorari "shall be taken or applied for within ninety days after the entry of such judgment."

The judgment of the Supreme Court of Missouri reported in 260 S. W. 2d 487 became final on September 14, 1953, when that Court overruled petitioner's (plaintiff's) Motion for a Rehearing or to Transfer to the Court en Banc, which date is admitted by petitioner to be correct and is set forth on the first page of his petition in this Court.

The ninety days within which the petition should have been filed expired December 13, 1953, and after that date this Court no longer had jurisdiction for review by writ of certiorari; therefore, this Court does not have jurisdiction to grant certiorari in this case. This is stated in the case of **Citizen's Bank of Michigan City, Ind., v. Opperman** (Ind., 1919), 249 U. S. 448, 449, 39 S. Ct. 330, 63 L. Ed. 701, 702, wherein this Court said:

> "Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months limitation begins to run from date of such denial or other disposition."

The case of **Boylan v. U. S.** (N. Y., 1921), 257 U. S. 614, 42 S. Ct. 113, 66 L. Ed. 397, is also in point.

II.

Petitioner served upon respondent Notice of Filing Petition for a Writ of Certiorari, which shows upon its face the various papers served and which does not include a copy of a transcript of the record in the case, and respondent therefore assumes that such a transcript was not filed with this Court.

Rule 38 (1) of this Court provides in part that "a petition for review on writ of certiorari of a decision of a state court of last resort . . . shall be accompanied by a certified transcript of the record in the case . . ." Rule 38 (3) provides in part that "Notice of the filing of the petition, together with a copy of the petition, printed record, and supporting brief shall be served by the petitioner on counsel for the respondent within ten days after the filing, and due proof of service shall be filed with the clerk."

We know that petitioner has not complied with Rule 38 (3) and assume that he has not complied with Rule 38 (1). Without a transcript of record respondent is not able to reply on the merits of the issues set forth in the petition nor the argument of petitioner.

CONCLUSION.

Failure of petitioner to supply a transcript has made it impossible for respondent to file a brief on the merits of petitioner's position on the legal issues involved; however, in any event, this Court is without jurisdiction to grant the writ prayed for, because the petition for the writ was not filed within the time prescribed by the statutes of the United States.

Respectfully submitted,

RICHARD WAYNE ELY,
ROBERT C. ELY,
Counsel for Respondent.